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Comment on Jana Singer's *Alimony and Efficiency*

MARGARET F. BRINIG*

I propose to make three comments on Professor Singer's article.¹ First, I will present my views on the limitations of law and economics when applied to family law. Second, I will discuss why specialization between husbands and wives is not necessarily efficient, and perhaps not even the best use of law and economics in the study of the family. Finally, and perhaps most controversially, I will question whether there are gender differences that should impact alimony law.

I. THE LIMITS OF LAW AND ECONOMICS

I will begin almost where Professor Singer left off,² with the use of "market failure" as a problem with the law and economics justification for alimony. The engaged couple usually knows each other quite well, perhaps very well if they have lived together, so there is good "quality" information.³ They also are fairly knowledgeable about the frequency and effects of divorce.⁴ In general, however, they have no expectation that their own marriage will end unhappily.⁵

* Professor of Law, George Mason University School of Law. I would like to thank participants in the Symposium and the Georgetown Law Center faculty workshop for their helpful suggestions and comments.

1. Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L.J. 2423 (1994).

2. *Id.* at 2451-53. (discussing marriage as a case of market failure).

3. George Stigler gives a general description of the search process. See generally George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213 (1961) (suggesting that people continue to search for better deals until the costs of additional search outweigh the expected gains from the search). See also Philip Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. 311, 323 (1970) (extending Stigler's theory to account for consumer ignorance about quality variations and about how store location affects consumer preferences). Stigler's theory is extended to the marriage market in PAULA ENGLAND & GEORGE FARKAS, *HOUSEHOLDS, EMPLOYMENT AND GENDER* 31-42 (1986); Gary S. Becker et al., *A Theory of Marital Instability*, 85 J. POL. ECON. 1141, 1144 (1977); Gary S. Becker, *A Theory of Marriage*, in *ECONOMICS OF THE FAMILY* 299, 308-12 (Theodore W. Schultz ed., 1974); and Margaret F. Brinig & Michael V. Alexeev, *Fraud in Courtship: Annulment and Marriage*, 1 EUR. J.L. & ECON. (forthcoming 1994). The economic model predicts that participants in the marriage market rate potential mates in terms of characteristics that will be important during the marriage: intelligence, health, earning potential, and so forth. Eventually, when the benefits of continued search are outweighed by its costs, the parties contract to be married.

4. Lynn A. Baker & Robert E. Emery, *When Every Relationship is Above Average*, 17 L. & HUM. BEHAV. 439, 444 (1993). Although couples knew the base results of divorce and its consequences, they displayed a "considerable lack of knowledge of divorce statutes." Law students, however, did much better than marriage license applicants.

5. *Id.* at 443.

Given the high national divorce rate, does such optimism represent a market failure or merely the result of bad predictions?⁶ Most cases in which market "failure" makes regulation essential do not involve transactions between two empowered individuals, but rather between parties with unequal bargaining power, such as the borrower and the bank or the tenant and the landlord.⁷ However, a recent survey of marriage applicants in Charlottesville revealed that these couples, though well-informed, were engaged in a "willing suspension of disbelief."⁸ Although the applicants in this survey realized that half of all marriages end in divorce, each thought that this surely would not be the fate of *their* marriage.⁹ While they realized that a large percentage of all responsible spouses fail to meet their support obligations, they refused to believe that their spouse would become a part of this large percentage.¹⁰ Their denial makes some sense, however, for it would be unreasonable to get married anticipating divorce or distrusting one's mate.

6. In commercial settings, outcomes that are worse than predicted will rarely justify extra contractual relief, even when losses are extremely large. *See, e.g., Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 442 (S.D. Fla. 1975) (holding that when a requirements contract for oil is violated, only contractual remedies are available despite change in oil price). The risks of nonperformance are supposed to be reflected in the contract price. *See, e.g., Stees v. Leonard*, 20 Minn. 448, 455 (1874) (once a party has agreed to perform a service, it must be done unless completely impossible; increased expense is no excuse); *see also* Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1149 (1981) (even in relational contracts, parties will be required to exert the "effort necessary to maximize the joint net product flowing" from the contract and will have to assume necessary risks); Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 632-33 (1979) (noting that consumers often make predictive decisions based upon insufficient information); Robert E. Scott, *Error and Rationality in Individual Decision-Making: An Essay on the Relationship Between Cognitive Illusions and the Management of Choices*, 59 S. CAL. L. REV. 329, 330 (1986) (discussing the effect of information on consumer prediction decisions).

7. Market failure is usually viewed as a justification for regulation because the usual self-regulatory features of the market are ineffective. The rules of the market prescribed by the common law may be ineffective in such cases as well. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 13.1, at 343 (3d ed. 1986); *see also* *Williams v. Walker-Thomas Furniture*, 350 F.2d 445, 449 (D.C. Cir. 1965) (finding cross-collateralization contract unconscionable because of unfair terms and unequal bargaining power). *See generally* Duncan Kennedy, *Distributional and Paternalistic Motives in Contract and Tort Law and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1980); Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983).

8. SAMUEL TAYLOR COLERIDGE, *BIOGRAPHICA LITERARIA* (1817). Jeffrey Stake suggests that cognitive dissonance theory may explain how an engaged person may sabotage uneasy feelings about the impending marriage. Jeffrey E. Stake, *Mandatory Planning for Divorce*, 45 VAND. L. REV. 397, 427 & n.126 (1992).

9. Baker & Emery, *supra* note 4, at 442-43. The 50% figure came from A.J. Norton & J.E. Moorman, *Current Trends in Marriage and Divorce Among American Women*, 49 J. MARRIAGE & FAM. 3, 3 (1987).

10. Baker & Emery, *supra* note 4, at 443. The actual figure is 50%. U.S. DEP'T OF HEALTH AND HUMAN SERV., *CHILD SUPPORT ENFORCEMENT*, 12TH ANN. REP. TO CONGRESS 5 (1989).

Although I would not term these results from the Baker and Emery survey—for example, low expectations of divorce despite a high divorce rate—market failure, I agree with Professor Singer that the observations accurately point out the limitations of law and economics when applied to the family. The couples in the Charlottesville survey were “in love.”¹¹ Each person surveyed was thinking beyond self-interest and toward their prospective spouse and their future together. Each was ready to engage in a set of promises that would affect not only themselves, but ultimately, as Professor Singer has pointed out, their children and the broader society as well.

The limitations of law and economics in the family context are evidenced by the differences between the marriage contract and commercial contracts. Most contracts take only their signatories into account, not providing for effects on third parties.¹² The parties to these commercial agreements frequently behave selfishly by attempting to secure agreements that maximize personal benefit without regard to the effect of the contract on the other party. Relational feminist writers characterize such private ordering as masculine because it “envision[s] society’s basic task as the preservation of a zone of individualized independence,” treating “as illegitimate a more typically feminist emphasis on the responsibilities that arise from the experience of a fundamentally social self.”¹³ Most marriages, however, bear little resemblance to either commercial contracts or other Chicago School law and economics efficiency-seeking ventures.¹⁴ At their best, marriages entail self-sacrifice, sharing, outward-looking behavior,¹⁵

11. See, e.g., George Bernard Shaw, *Getting Married*, in *THE DOCTOR’S DILEMMA, GETTING MARRIED AND THE SHEWING UP OF BLANCO POSNET* 139 (1911): “[W]hen two people are under the influence of the most violent, most insane, most delusive, and most transient of passions, they are required to swear that they will remain in that excited, abnormal and exhausting condition continuously until death do them part.”

12. In fact, most discussions on divorce focus on the adults in the nuclear family, and do not allow the children to share their assets. MARTHA FINEMAN, *THE ILLUSION OF EQUALITY* 43 (1991).

13. MILTON C. REGAN, *FAMILY LAW AND THE PURSUIT OF INTIMACY* 159-60 (1992). The idea that contracts have a masculine cast has not, of course, been lost on feminists. See generally Janet L. Dolgin, *Status and Contract in Feminist Legal Theory of the Family: A Reply to Bartlett*, 12 *WOMEN’S RTS. L. REP.* 103 (1990); Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 *AM. U. L. REV.* 1065 (1985); Mary Joe Frug, *Rescuing the Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law*, 140 *U. PA. L. REV.* 1029 (1992); Robin West, *Jurisprudence and Gender*, 55 *U. CHI. L. REV.* 1 (1988).

14. One older case, *Alexander v. Kuykendall*, 63 S.E.2d 746, 747-48 (Va. 1948), disallowed contractual recovery by a putative wife because she acted out of love, rather than hope of reward. The court reasoned:

Not business or money, but wedlock is what the parties contemplate. They are, or should be, motivated by love and affection to form a mutual and voluntary compact to live together as husband and wife, until separated by death, for the purpose of mutual happiness, establishing a family, the continuance of the race, the propagation of children, and the general good of society.

Id.

15. See, e.g., REGAN, *supra* note 13, at 94-95, 188 (claiming that marriage can be built on

and perhaps even a more "feminine" view of the universe.¹⁶ They are relationships, not just relational contracts.

Regardless of what the couples' prospects and predictions are *ex ante*, as a society we have tremendous incentives to promote the non-contractual view of marriage. The incentives exist precisely for the reasons Professor Singer suggests: what is being maximized here is not financial wealth, even though marriage may enhance monetary well-being.¹⁷ People generally do not get married for the reason many give for going to law school—the desire to make a lot of money. They get married because they believe (or know) that living with the other, sharing with the other, and creating with the other will make them happy. And the commitment, that neither will breach even when getting out may be "more efficient,"¹⁸ is central to

selfless actions of the partners); Elizabeth S. Scott, *Rational Decisionmaking about Marriage and Divorce*, 76 VA. L. REV. 9, 23 (1990) (arguing that a successful marriage creates self-fulfillment through mutual dependence and commitment); Stake, *supra* note 8, at 422 (noting that marriage often occasions self-sacrifice).

16. See Marion Crain, *Feminism, Labor and Power*, 65 S. CAL. L. REV. 1819, 1886 (1992). Crain argues:

A feminine view of human nature tends to be positive and the exercise of power by women more affirming. Such a fundamental optimism in a group that has been colonized and oppressed, often in very violent ways, is remarkable and perhaps accounts for the certainty of many feminists that we are unlikely to exercise power in the same way that our oppressors have.

Id. See generally NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING* (1978); CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHIATRIC THEORY AND WOMEN'S DEVELOPMENT* (1982). But cf. Karen Czapansky, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415, 1416 n.4 (1991) (arguing that men and women are not different in their relation to their children and so should be treated equally); Tina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1550 (1991) (noting that women approach problems in a relational context); Beverly Horsbaugh, *Redefining the Family: Recognizing the Altruistic Caretaker and the Importance of Relational Needs*, 25 U. MICH. J.L. REF. 423, 457 (1992) (advocating legal recognition of the rights of caretakers and changes in the workplace to encourage both spouses to care for their children). An alternative to the term "feminine view" may be a "relational ethic." See REGAN, *supra* note 13, at 164 (defining the relational ethic as the way in which women more often than men define their individuality in terms of their relations with others).

17. Studies have shown that married executives are paid more than their single counterparts. VICTOR FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* 78 (1988). They may be freed to be the "ideal worker" because of the career choices their wives make. See Felice N. Schwartz, *Management Women and the New Facts of Life*, HARV. BUS. REV., Jan.-Feb. 1989, at 65.

18. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 89-90 (2d ed. 1977) (espousing the idea that in the commercial context, parties to a contract are both made better off when one breaches for a better opportunity and pays the other what was expected under the contract); Ian R. Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947, 957 (1982) (presenting the idea that in the commercial context, parties to a contract can be made better off when one breaches for a better opportunity and pays the other what was expected, if transactions costs are low enough); Ian R. Macneil, *The Many Futures of Contract*, 47 S. CAL. L. REV. 691, 722 (1974) (claiming that contracts such as

marriage.¹⁹ It is the commitment (or as I have called it recently, the covenant)²⁰ that promotes what Professor Regan calls "the pursuit of intimacy."²¹ Due to this intimacy, clean breaks after lengthy marriages, especially when children are involved, are not really possible because there is too much invested, too much shared.²²

Having said all this, I believe, like Professor Singer, that economics does offer insights into the family, how it has changed, and how our lawmaking affects it. In class and in one of my recent pieces,²³ I describe an "old marriage," in which the Becker specialization model²⁴ made perfect sense, and a "new marriage," in which it does not.²⁵ One of the problems of current alimony law, as several writers have recognized, is its failure to accommodate people who began under the "old marriage" regime and are divorcing under the "new," no-fault system.²⁶ The problem of reconciling alimony with the "new marriage," founded on equality, love, market power

marriage are based on relational concepts and are not breachable for transactional considerations). Efficient breach in the marriage context is discussed in Ira M. Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 66 & n.166 (1987).

19. REGAN, *supra* note 13, at 116-17; *see also* Bruce C. Hafen, *The Family as an Entity*, 22 U.C. DAVIS L. REV. 865, 892 (1989) (arguing that families should be considered as entities, and not as contracting parties).

20. Margaret F. Brinig, *Status, Contract and Covenant: A Review of Family Law and the Pursuit of Intimacy*, 89 CORNELL L. REV. (forthcoming 1994).

21. REGAN, *supra* note 13, at 2.

22. REGAN, *supra* note 13, at 148; Scott, *supra* note 15, at 36.

23. Margaret F. Brinig & Steven M. Crafton, *Opportunism in Marriage*, 22 J. LEGAL STUD. 869 (1994).

24. Becker writes that even though the parties have functioned similarly prior to marriage, they will begin to specialize once the marriage occurs. GARY S. BECKER, A TREATISE ON THE FAMILY 31-37 (2d ed. 1991). Specialization will occur as the couple realizes gains from the partners' comparative advantage in one or more functions. They will engage in two kinds of labor, which he calls market labor (earning money to purchase goods) and leisure activities (spending money, or at any rate not earning more). The spouse engaged in household production divides time between the production of household goods and leisure. In household production, the spouse transforms purchased goods into ultimate consumption goods.

If one spouse has a comparative advantage in household production, however small, Becker predicts that the efficient couple will specialize. He argues that because only women can bear children, they have the comparative advantage when it comes to household production. This advantage will increase because growing girls will invest in human capital that enhances their efficiency at producing household goods. Their husbands, on the other hand, will specialize in market production. They will choose human capital investments before marriage to maximize production in the labor force. Premarriage specialization will also make a more attractive mate.

25. Brinig & Crafton, *supra* note 23, at 875-81.

26. *See, e.g.*, Brinig & Crafton, *supra* note 23, at 878-80 (many women have remained out of the market to care for children and, therefore, cannot earn as much as their husbands after divorce); Ellman, *supra* note 18, at 56-58, 74-77 (1989) (homemakers make a rational decision to stay out of the job market and should have their losses mitigated); Herma Hill Kay, *An Appraisal of California's No-Fault Law*, 75 CAL. L. REV. 291, 315-16 (1987) (describing inadequacy of alimony provisions under California's no-fault divorce laws).

for both spouses, and the "spaces" of Khalil Gibran,²⁷ has bothered me for many years.²⁸

The answer June Carbone and I reached to this problem is that marriage in a no-fault system may involve multiple agreements.²⁹ There is the central bargain, the contract terminable at-will,³⁰ for which alimony is not appropriate unless legislators decide that private welfare is a better system than public assistance.³¹ There may also be "side deals."³² For example, some couples may agree that one spouse will get a graduate degree that both will benefit from later, and that they will finance it through the

27. Discussing marriage, Gibran wrote: "Let there be spaces in your togetherness." KHALIL GIBRAN, *THE PROPHET* 19 (1923).

28. In fact, my two alimony pieces coauthored with June Carbone began with the question of how to justify damages in a contract terminable at will. Margaret F. Brinig & June R. Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855, 905 (1988); June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change and Divorce Reform*, 65 TUL. L. REV. 953, 1002 (1991).

29. Brinig & Carbone, *supra* note 28, at 881-82; June R. Carbone, *Economics, Feminism, and the Reinvention of Alimony, or Why the Desire to Remove Distorting Incentives Does Not a Theory Make*, 43 VAND. L. REV. 1463, 1469 (1990).

30. See, e.g., Brinig & Carbone, *supra* note 28, at 887 & n.132 (alimony should not be awarded based upon fault); Brinig & Crafton, *supra* note 23, at 880 (although modern marriage is terminable at will, there should be damages for breach of the other terms of the contract); Carbone & Brinig, *supra* note 28, at 978-79 (marriage is a contract terminable at will); Theodore F. Haas, *The Rationality and Enforceability of Contractual Restrictions on Divorce*, 66 N.C. L. REV. 879, 884 (1988) (modern liberal divorce laws are based on the premise that parties should not be trapped in marriage); Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1809 (1985) (no-fault divorce laws reflect a societal decision not to publicly enforce the moral standard of life-long fidelity); Scott, *supra* note 15, at 17 (criticizing view of marriage as an arrangement promoting the selfish ends of each spouse); Stake, *supra* note 8, at 401 (divorce has become a matter of convenience).

31. Many women who were in middle class or working class marriages end up on welfare if they are not supported by their former spouses. In some senses, alimony has been treated in the literature as a less distinguished form of unemployment compensation. For descriptions of the "private welfare" system, see Brinig & Carbone, *supra* note 28, at 891-92 (arguing that Oregon has substituted private alimony for public welfare); Mary E. O'Connell, *Alimony after No-Fault: A Practice in Search of a Theory*, 23 NEW ENG. L. REV. 437, 492 (1988) (noting that alimony is awarded for practical considerations and not as "make whole" damages). See generally LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985). A further justification is prevention of abuse or opportunism by a party to the marriage contract. This remedy for breach is available in a contract terminable at-will. See Brinig & Crafton, *supra* note 23, at 871 & n.10 (arguing for usual damage remedies for breaches other than dissolution of contract).

32. See, e.g., Brinig & Carbone, *supra* note 28, at 898 (the decision to marry "well" rather than pursue a career can be such a "side-deal"); Carbone, *supra* note 29, at 1489-90 (married couples must reach decisions as to the form of specialization each party will take); Ellman, *supra* note 18, at 40-48 (noting that the wife in a traditional marriage makes many initial investments of value only to her husband; these investments would only be made by a self-interested bargainer in exchange for a long-term commitment); Elisabeth Landes, *The Economics of Alimony*, 7 J. LEG. STUD. 35, 35 (1978) (alimony compensates wife for her investments in the marriage, as well as her opportunity costs incurred by entering the marriage).

interest-free loan the other's continuing work provides.³³ Alternatively, some couples may choose to have one spouse be the primary child caregiver, holding the more flexible job or perhaps staying at home for a few years.³⁴ One spouse may give up a secure job as a tenured law professor so that the couple can move in order to accommodate the other's more satisfying employment prospect.³⁵

These arrangements, and others like them, are part of most marriages. They are typically the stuff of which alimony is made, because most states do not consider that future earnings streams are marital property capable of valuation at the time of divorce.³⁶ Unlike Allen Parkman,³⁷ but like Professor Singer, I believe that alimony should encompass some investments as well as reliance losses.³⁸ At the very least, the divorcing spouse

33. See, e.g., Katherine K. Baker, *Contracting for Security: Paying Married Women What They've Earned*, 55 U. CHI. L. REV. 1193, 1196 (1988) (arguing that a professional degree is a form of marital property); Lloyd Cohen, *Marriage, Divorce and Quasi Rents, Or "I Gave Him the Best Years of My Life"*, 16 J. LEG. STUD. 267 (1987); Samuel A. Rea, Jr., *Breaking Up is Hard to Do: The Economics of Spousal Support* (May 19, 1993) (unpublished manuscript, on file with the *Georgetown Law Journal*).

34. See, e.g., Carbone & Brinig, *supra* note 28, at 986 (noting that new model of alimony sees childrearing as compensable because of lost career opportunities); Ellman, *supra* note 18, at 53-73; O'Connell, *supra* note 31, at 498-506; Marcia O'Kelly, *Entitlement to Spousal Support After Divorce*, 66 N.D. L. REV. 225 (1985) (arguing that marital specialization often causes women to remain home to rear children). See generally Beninger & Smith, *Career Opportunity Cost A Factor in Spousal Support Determination*, 16 FAM. L.Q. 201, 203 (1982) (noting that wives still have primary responsibility for childcare).

35. See, e.g., Ellman, *supra* note 18, at 61-62.

36. The only state to do so consistently is New York. See *O'Brien v. O'Brien*, 489 N.E.2d 712, 718 (N.Y. 1988) ("[F]ixing the present value of that enhanced earning capacity . . . [is] no more difficult than computing tort damages for wrongful death or diminished earning capacity from injury."). Cases rejecting the idea include: *Graham v. Graham*, 574 P.2d 75, 77 (Colo. 1978) (holding that an educational degree was not marital property within the meaning of the Uniform Dissolution of Marriage Act); *In re Marriage of Weinstein*, 470 N.E.2d 551, 560 (Ill. App. Ct. 1984) ("We decline to adhere to [the] view that . . . potential increased future earning capacity should be labelled instead as the value of [a] degree and license and in that guise be considered marital property."); *Stern v. Stern*, 331 A.2d 257, 260 (N.J. 1975) ("We agree with defendant's contention that a person's earning capacity, even where its development has been aided or enhanced by the other spouse, as is here the case, should not be recognized as a separate, particular item of property."). See generally Brinig & Crafton, *supra* note 23, at 889 & n.56.

37. ALLEN M. PARKMAN, *NO FAULT DIVORCE, WHAT WENT WRONG?* 41, 130 (1992).

38. One way this could be accomplished is through an equitable lien imposed on the other spouse's property, a concept borrowed from community property jurisdictions. See Margaret F. Brinig, *The Law and Economics of No-Fault Divorce—A Review of No-Fault Divorce: What Went Wrong*, 26 FAM. L.Q. 453, 459-60 & n.45 (1993) (arguing that the investment of human capital justifies payments from one spouse to another); see also Deborah A. Batts, *Remedy Refocus: In Search of Equity in "Enhanced Spouse/Other Spouse" Divorces*, 63 N.Y.U. L. REV. 751, 780-81 (1988) (noting that alimony awards can act as a lien on a spouse's property); Joan M. Krauskopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investment in Human Capital*, 28 KAN. L. REV. 379, 402 (1980) (arguing that a spouse's assistance in education is an investment in human capital that should be split at divorce); Christopher J. Bruce, *A Contractual Model of the Determination of Spousal Support Upon Divorce* (May 1994) (unpublished working paper, on file with the *Georgetown*

who put the other through school should receive the original investment plus interest.³⁹ The interest rate should reflect that this was a relatively risky loan (or, if you prefer, dividends on the equity contribution that will fluctuate with the "profitability" of the investment). The recovery should not depend upon an opportunity lost by the investing spouse. One of the particularly galling cases that I discovered involved a nurse who put her husband through dental school in addition to raising their son.⁴⁰ When he became a pediatric dentist, earning four times her salary, and then divorced her, the court did not award her any alimony because her career had not suffered.⁴¹ In all fairness, she ought to have been able to recover under either an investment or a quantum meruit theory.⁴²

There are other functions of alimony as well, as Professor Singer notes. These, too, relate to a more general civil obligation scheme.⁴³ First, in Carl Schneider's terms, alimony serves a particular channeling function.⁴⁴ It urges us into what society believes is a more beneficial path for us and for our children.⁴⁵ Alimony in particular and family law in general make us behave more like ideal couples in happy marriages. We need more investing in each other and in the relationship, not more specialization. We need not be "efficient," just good partners and good parents.⁴⁶

Cast in economic terms, this channeling function is related to the idea that a credible threat of alimony will deter negative behavior (on the margin).⁴⁷ Not only may alimony cause us to invest in our relationships

Law Journal) (suggesting recovery of gains where they are greater than the couple predicted at the time the arrangement was made).

39. PARKMAN, *supra* note 37, at 41.

40. Gagliano v. Gagliano, 211 S.E.2d 62 (Va. 1975).

41. *Id.* at 65.

42. *See, e.g.,* Dela Rosa v. Dela Rosa, 309 N.W.2d 755 (Minn. 1981) (court has equitable power to reimburse working spouse for expenditures toward student spouse's living costs and tuition).

43. Carbone & Brinig, *supra* note 28, at 954 & n.3, 957-61.

44. Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992).

45. *See, e.g.,* REGAN, *supra* note 13, at 187 (discussing the role of family law as the creator of human caring that restricts selfish actions).

46. *Id.* at 188.

47. Civil liability in general is described by economists as a system of incentives designed to encourage or deter future behavior. *See* ROBIN PAUL MALLOY, LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE 2-5 (1990) (explaining the use of economics to explore and question current legal arrangements). *See generally* MITCHELL A. POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (1989); Victor P. Goldberg, *Price Adjustments in Long Term Contracts*, 1985 WIS. L. REV. 527; Victor P. Goldberg, *Trade Regulation and the Role of Government in Private Insurance Markets: Comment on Danzon*, 13 J. LEGAL STUD. 565 (1989).

For a discussion of how this system of incentives applies to marital behavior, see Lynn A. Baker, *Promulgating the Marriage Contract*, 23 U. MICH. J.L. REF. 217, 232 (1990) (suggesting that divorce law could deter women from having another child); Brinig & Crafton, *supra* note 23, at n.58-60.

(decreasing the probability of divorce),⁴⁸ but it may deter the kind of behavior that ended in Virginia's most celebrated family law case⁴⁹ since the Lovings' lawsuit.⁵⁰ This, too, is a worthwhile goal not requiring gender specialization.

A third goal, also recognized by Professor Singer, is that when we give couples some enforceable security in their marriage while allowing for intimate behavior, we decrease the need for protective measures. Economists call these behaviors "rent-protective devices."⁵¹ When discussing these devices, economists usually do not use marriage as their example, but instead write about such things as burglar alarms, dead-bolt locks, and Doberman pinschers. These are acquisitions that are not wealth generating in themselves; rather, they are acquired to protect one's wealth. In marriage, protective devices may not even be utility neutral, they may actually be happiness decreasing.⁵² For example, a spouse may continue employment in an unfulfilling job solely to preserve his or her options in the event that the marriage fails. Similarly, a spouse may not cut off all extramarital romantic contacts, just in case the marriage goes sour.⁵³ A spouse may choose to spend time with premarital hobbies or activities to reduce the degree of loneliness if the marriage does not work out.⁵⁴

II. WHY SPECIALIZATION ISN'T ALWAYS EFFICIENT

To this point I have argued that efficiency, at least in a financial sense, need not be the goal of the family. Next, I would like to address some problems inherent in the economists' view of specialization, comparative

48. Brinig & Crafton, *supra* note 23, at nn.104-06.

49. *Bobbitt v. Bobbitt*, (Chancery Ct. No. 34993) (Cir. Ct. Prince William County, Md., July 9, 1993). The argument is not that any single act of spousal abuse might not occur, but that "marginal" or undecided spouses may think twice if they know that abusive behavior will result in substantial financial penalties. For example, to the extent that much abuse occurs when the battering spouse is intoxicated, he (or she) may refrain from drinking.

50. *Loving v. Virginia*, 388 U.S. 1 (1967) (invalidating Virginia's antimiscegenation statute and declaring that marriage is a fundamental right).

51. See, e.g., Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 200-01 (1968) (describing the private measures taken to protect against crime, and hypothesizing that fines for criminal behavior would decrease this expenditure); Charles K. Rowley, *Rent-Seeking Versus Directly Unproductive Profit-Seeking Activities*, in *THE POLITICAL ECONOMY OF RENT SEEKING* 15, 22 (Charles K. Rowley et al. eds., 1988) (proposing that rent-seeking activities may increase the utility of the individual while decreasing wealth or social good).

52. See, e.g., Stake, *supra* note 8, at 406 (investing in protective measures such as a career reduces the investment in the marriage and increases the possibility of divorce).

53. This is apparently what led to the demise of the marriage of Burger King's president in *Smith v. Smith*, 400 So. 2d 803 (Fla. 1981).

54. Sometimes even this seemingly benign loss limitation technique can harm the marriage. For example, a recent Virginia case involved a woman who began to "build up walls" early in her marriage, eventually screening her husband out. *Sprott v. Sprott*, 355 S.E.2d 881, 882-83 (Va. 1987).

advantage, and efficiency in marriage. There are several points here, and they relate to the assumptions Becker,⁵⁵ Ellman,⁵⁶ and Parkman⁵⁷ make, which, in turn, generate a particular, gendered, family law regime.⁵⁸

I think five assumptions (among the twelve identified)⁵⁹ are most critical to the efficiency argument. The economists assume:

55. GARY S. BECKER, *TREATISE ON THE FAMILY* 15-21 (1981) [hereinafter BECKER, *TREATISE*]; Gary S. Becker, *A Theory of the Allocation of Time*, 75 *ECON. J.* 493, 512 (1965) [hereinafter Becker, *Allocation*]; Becker, *supra* note 3, at 30-53; Becker et al., *supra* note 3, at 1145-46; see also Reuben Gronau, *The Intrafamily Allocation of Time: The Value of the Housewives' Time*, 63 *AM. ECON. REV.* 634, 649 (1973) (assuming that women's work inside the home is worth more than what she could earn in the market, thereby making specialization efficient); Elisabeth M. Landes, *The Economics of Alimony*, 7 *J. LEGAL STUD.* 35, 41-42 (1978) (assuming that both spouses will specialize in order to increase the income of the household).

56. Ellman, *supra* note 18, at 46-47.

57. PARKMAN, *supra* note 37, at 28-34.

58. The predictions of the efficient specialization model include a fault system to protect against shirking, see BECKER, *supra* note 24, at 49; alimony to protect the wife's human capital investment in marriage, Landes, *supra* note 55, at 46; the recognition that the husband makes important decisions for the couple, see Reva B. Siegel, *Home as Work: The First Women's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 *YALE L.J.* 1073 (1994); and the presumptions in favor of wife in custody, see, e.g., FUCHS, *supra* note 17, at 42-74.

59. The other assumptions include the postulate that the wife and husband have children (or plan to have them), see, e.g., BECKER, *supra* note 24, at 44-45; that the husband can earn enough to support the family, see, e.g., Brinig, *supra* note 38, at 456 & n.20; that the children make no contribution to "household production" and that there must be something to discourage opportunism in contract, see, e.g., BECKER, *supra* note 24, at 30-31; cf. Cohen, *supra* note 33, at 283-84; that the children will be in the household for most of the marriage, BECKER, *supra* note 24, at 55 (noting that the need for this is declining, so there is more incentive to invest in market-oriented human capital); that the split between leisure and work time is equal between the spouses, BECKER, *supra* note 24, at 56; and that they should not deduct wasted human capital resources from the total household production, see, e.g., Becker, et al., *supra* note 3, at 1145-47. *But cf.* Landes, *supra* note 55, at 41, ("It is important to emphasize that the cost to the family in terms of the wife's earnings includes not only current foregone earnings but also loss of market earning power, through depreciation of market skills previously acquired, and foregone opportunities to invest in market skills.").

On the other hand, a more modern model of marriage as a partnership might involve assumptions like individualism within the marriage, equality among spouses, roughly equivalent earning capacity between the spouses, and a need for flexibility over time. The legal regime governing this more modern model would likely include no-fault divorce, see PARKMAN, *supra* note 37, at 72; Douglas Allen, *What's at Fault with No Fault?*, (September 25, 1992) (unpublished manuscript, on file with the *Georgetown Law Journal*); no alimony, or rehabilitative alimony only, see H. Elizabeth Peters, *Marriage and Divorce: Informational Constraints and Private Ordering*, 76 *AM. ECON. REV.* 437, 449 (1986); and no presumptions favoring either spouse with respect to custody, and equal responsibility for child support, see generally Czapanskiy, *supra* note 16. Behavioral predictions of this system include more prenuptial contracts, see Cohen, *supra* note 33, at 297; Ellman, *supra* note 18, at 10 & n.18; Stake, *supra* note 8, at 415-25; see also Marjorie Macguire Schultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 *CAL. L. REV.* 204, 242 (1982); more variety among marriages and families such as single parent homes, adoptive families, blended families, and lesbian and gay families, Martha Minow, *All in the Family and in All Families: Membership, Loving, and Owning*, 95 *W. VA. L. REV.* 275, 286 (1993); more divorces, PARKMAN, *supra* note 37, at 94; Brinig & Crafton, *supra* note 23, at 883; Ellman, *supra* note 18, at 45; more suits among spouses, Brinig & Crafton, *supra* note 23, at 892; less investment in marriage, PARKMAN, *supra* note 37, at 94; Becker et al., *supra* note 3, at 1142; Brinig & Crafton, *supra*

One. The wife is better at child care than her husband.⁶⁰ This may be for biological reasons or because she has invested more in nonmarket human capital prior to marriage than he has.⁶¹

Two. The wife earns less than her husband in the labor market.⁶² Becker notes the circularity of some of these arguments as he writes:

If child care and other housework demand relatively large quantities of "energy" compared to leisure and other nonmarket uses of time by men, women with responsibility for housework would have less energy available for the market than men. This would reduce the hourly earnings of married women, affect their jobs and occupations, and even lower their investment in market human capital when they worked the same number of market hours as married men. Consequently, the housework responsibilities of married women may be the source of much of the difference in earnings and in job segregation between men and women.⁶³

Three. There is specialization between husband and wife, but not among women. The writers assume it is not "efficient" to hire someone else to do the wash or clean the house.⁶⁴

note 23, at 883; Cohen, *supra* note 33, at 287, 295; Ellman, *supra* note 18, at 25; more investment in individual human capital, *see* Cohen, *supra* note 33, at 295; Marsha Garrison, *Marriage: The Status of Contract*, 131 U. PA. L. REV. 1039, 1058 (1983); fewer children, BECKER, *supra* note 24, at 349; PARKMAN, *supra* note 37, at 94-96; Becker, et al., *supra* note 3, at 1172; Brinig & Crafton, *supra* note 23, at 887; and fewer marriages, *see* Brinig & Crafton, *supra* note 23, at 884; Cohen, *supra* note 33, at 296; Peters, *supra* at 443-44.

60. *See, e.g.*, PARKMAN, *supra* note 37, at 28 (arguing that women specializing in child care is more efficient because only women can give birth and women earn less than men).

61. *See, e.g.*, Becker et al., *supra* note 3, at 1146 (describing the areas where women invest their capital: child rearing, household management, and domestic activities); PARKMAN, *supra* note 37, at 29-33 (tracing a woman's choice to specialize to both biology and poorer chances in the work market).

62. I am using Parkman's simplification that wives earn only 60% of their husband's income. PARKMAN, *supra* note 37, at 28 & n.7; *see also* Francine D. Blau & Lawrence M. Kahn, *The Gender Earnings Gap: Learning from International Comparisons*, 82 AM. ECON. REV. PAPERS & PROC. 533, 534 & tbl. 1 (1992) (59.44% for married women, 1985-86). More recent data places the number somewhat higher. *See* Ellman, *supra* note 18, at 46 & n.137 (noting that in three-fourths of marriages where both spouses work, the wife's earnings were less than 80% of her husband's). If the rest of the economic assumptions held true, "efficiency" might still dictate complete specialization. *See* Yoram Barzel & Ben T. Yu, *The Effect of the Utilization Rate on the Division of Labor*, 22 ECON. INQUIRY 18, 23-24 (1984) (arguing that diminishing returns from further specialization reduce some, but not all, of its value).

63. BECKER, *supra* note 24, at 56; *see also* Ellman, *supra* note 18, at 4 & n.2 (estimating that the difference in domestic responsibilities accounts for 70% of the difference in earnings between men and women).

64. For a more lengthy discussion of this proposition, *see* Brinig, *supra* note 38, at 456-57 & nn.20-22. I am not advocating that parents should abdicate child rearing functions to an underpaid class of child care specialists or to government-regulated services. In an ideal world, both parents would be actively, and nearly equally, involved in their children's lives. For the time being, perhaps for most of our generation, I don't see enough adjustments in

Four. The only things that should be maximized are dollar income and the production of household commodities. Economists do not count the wife's psychic costs when they calculate her opportunity cost of staying out of the labor market.⁶⁵ Similarly, when economists work with the husband's labor force production, they do not count the cost of his working "to capacity" in the labor market at the expense of having real relationships with his children.

Five. Most important for this discussion, there are no diminishing returns in this model, but always gains from additional specialization.⁶⁶

Let us assume for the sake of argument that the first three conditions are satisfied, and even that women's and men's preferences work the same way.⁶⁷ Still, if we start counting psychic costs, and assume that neither women nor men are as productive during their last hour of work as they are during their first, the conclusions that follow from these assumptions are dramatically altered.⁶⁸

The Table and Figure show that even though total production increases with complete specialization, total profits do not increase. Thus, even if we accept many of the very strong assumptions made by economists, specialization will not necessarily lead to efficiency because neither spouse really benefits from "all work and no life," as my teenage daughter puts it. Society does not benefit either, as the line for the couple's joint benefits shows.

Even in those cases where couples choose complete specialization, realizing all Becker's efficiency gains, the decision is not economically "robust." A recent tragic incident illustrates my point. When the wife of one of my colleagues died in a car accident this summer, he was left quite suddenly as

the workplace to allow this kind of sharing. See Mary E. O'Connell, *On the Fringe: Rethinking the Link Between Wages and Benefits*, 67 TUL. L. REV. 1421, 1478-88 (1993) (suggesting that modern divorce imposes a double stigma of deviancy upon women, who have already foregone a lifelong career and at divorce forgo lifelong attachment to a male). See generally Nancy E. Dowd, *Family Values and Valuing Family: A Blueprint for Family Leave*, 30 HARV. J. ON LEGIS. 335 (1993); Deborah L. Rhode & Martha Minow, *Reforming the Questions, Questioning the Reforms: Feminist Perspectives on Divorce Law*, in *DIVORCE REFORM AT THE CROSSROADS* 192 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

65. PARKMAN, *supra* note 37, at 102-03; Brinig, *supra* note 38, at 457; Ellman, *supra* note 18, at 54-55; Landes, *supra* note 55, at 35, 40.

66. See, e.g., PARKMAN, *supra* note 37, at 102 (the fear women have of the marriage dissolving leads women to resist specialization and makes everyone worse off); Ellman, *supra* note 18, at 47-48 (a wife deciding not to specialize lowers the income for the family as a whole and increases the likelihood of divorce). A brief discussion of this problem appears in Brinig, *supra* note 38, at 457-58.

67. This, too, is a strong assumption. These economists imply that individuals get the same relative satisfaction (or frustration) out of working all the time or being home all the time. As I will show in the next part, this is not necessarily true.

68. I know I personally went far beyond the point where diminishing marginal returns from children set in during a recent ice storm, when I had lots to do at work, no child care, and five children marooned at home fighting with each other.

TABLE I
WHAT HAPPENS TO PROFIT,⁶⁹ AS OPPOSED TO PRODUCTION?⁷⁰

Division	Wife-Labor	Wife-Home	Wife-Costs	Wife-Profit	Husband-Labor	Husband-Home	Husband-Costs	Husband-Profit	Total Profit	Total Production
1	59	0	-20	39	0	59	0	59	98	137
2	56	8	-18	46	8	55	-2	61	107	155
3	51	19	-16	54	19	51	-4	66	120	178
4	47	32	-14	65	32	47	-6	73	138	209
5	39	48	-12	75	48	39	-8	79	154	237
6	29	64	-12	81	64	29	-10	83	164	255
7	19	76	-14	81	76	19	-12	83	164	257
8	11	86	-16	81	86	11	-15	82	163	259
9	5	94	-18	81	94	5	-18	81	162	261
10	0	100	-20	80	100	0	-20	80	160	260

the single parent of three children under the age of twelve. His marriage had been ideal in the Becker sense, and the family had been very happy. Without even the time for thought divorce brings, he had to learn nearly everything about "household production." Had my friend's marriage been less specialized, his grief, and that of his children, would not have been compounded by panic and near ineptitude. Becker's model works best, if at all, with marriages that end "in due course."

III. ARE THE ECONOMIC DIFFERENCES BETWEEN MEN AND WOMEN INHERENT?

My academic interest in this topic began when I was working with an economist on a bargaining paper.⁷¹ We were examining whether Robert Mnookin and Lewis Kornhauser⁷² were correct in claiming that women trade custodial time for money at the time of divorce. We looked at

69. I realize that I am using the economic term. Profits are merely the revenues less the costs. Perhaps happiness is better, or fulfillment. Usually economists assume that parties continue to add units of labor until the marginal product equals the marginal cost. This would occur in the numerical example at Division 6 or 7.

70. Gary Becker coined the term "household production." Becker, *Allocation*, *supra* note 55, at 516.

71. Margaret F. Brinig & Michael V. Alexeev, *Trading at Divorce: Preferences, Legal Rules and Transaction Costs*, 8 OHIO ST. J. ON DISP. RESOL. 279, 280 (1993). An earlier version of this paper also appears as Margaret F. Brinig & Michael V. Alexeev, *Legal Rules, Bargaining and Transaction Costs: The Case of Divorce*, in SYSTEMATIC DISPUTE RESOLUTION 91 (Stuart S. Nagel & Miriam K. Mills eds., 1991).

72. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 951 (1979); see also Richard Neely, *The Hidden Cost of Divorce: Barter in the Court*, NEW REPUBLIC, Feb. 10, 1986, at 13 (noting that mothers are forced to barter support for custody in a no-fault regime).

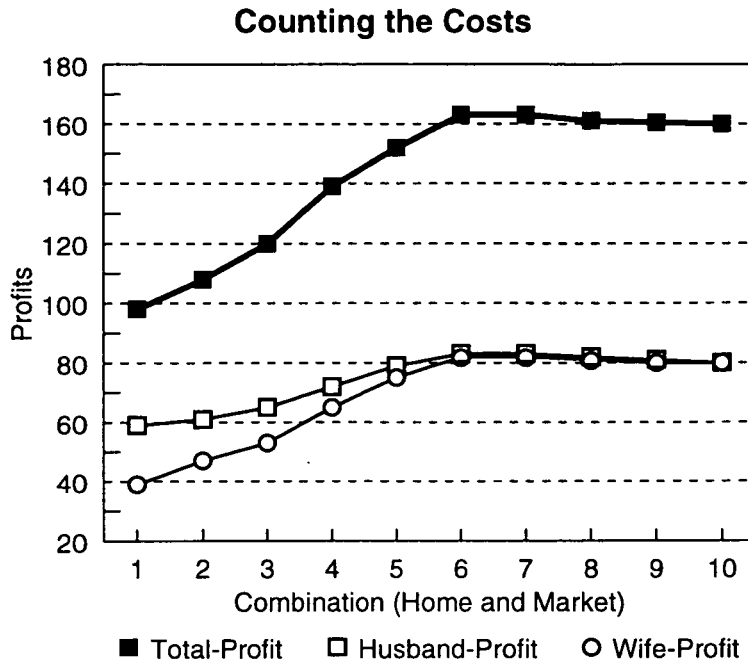


FIGURE I. Specialization, Counting Costs, and Diminishing Returns

divorce outcomes from two very different legal regimes.⁷³ We discovered that no matter which legal regime governed, the vast majority of couples settled prior to litigation,⁷⁴ and that they divided custody and property almost identically.⁷⁵ When we tried to analyze the data in terms of market

73. As one example of a statutory regime, we chose Wisconsin, which has no-fault divorce and alimony, WIS. STAT. ANN. § 767.12 (1993); rehabilitative maintenance, WIS. STAT. ANN. § 767.26 (1993); a presumption of equal division of property, WIS. STAT. ANN. § 767.255 (1993); and a presumption in favor of joint custody, WIS. STAT. ANN. § 767.24 (1993). This last section was amended in 1988, removing the presumption. The other example was Virginia, which has a fault and no-fault divorce regime, VA. CODE ANN. § 20-91 (Michie 1950); the possibility of permanent alimony, VA. CODE ANN. § 20-107.1 (Michie 1950 & Supp. 1994); equitable property distribution under VA. CODE ANN. § 20-107.3 (Michie 1950 & Supp. 1994); and a "best interests standard" for child custody, VA. CODE ANN. § 20-107.2 (Michie 1950 & Supp. 1994).

74. Brinig & Alexeev, *supra* note 71, at 280. We found that 10% of the cases in Virginia and about 5% in Wisconsin went to trial. *Id.* at 294 tbl. II. This is consistent with findings of Robert H. Mnookin, *Divorce Bargaining: The Limits on Private Ordering*, 18 U. MICH. J.L. REF. 1015, 1016 (1986); and Marygold S. Melli et al., *The Process of Negotiation: An Exploratory Investigation in the Context of No-Fault Divorce*, 40 WIS. L. REV. 1133, 1142 (1988).

75. Brinig & Alexeev, *supra* note 71, at 293 & tbl. I. The wife's mean share of property in Virginia cases was 40% (not including alimony, which was awarded in more than a third of the cases); in Wisconsin the mean share was 50%. The wife was awarded custody in 76.6% of the cases in Wisconsin, and 74.8% in Virginia. These differences, reflecting more than a hundred complete files involving both custody and property distribution from a single suburban county in each state, are not statistically significant. What was distinctive in our

behavior, we found that there were two possible explanations for our results. The first was that married women with children were more risk averse than their husbands (as the literature suggested).⁷⁶ The second, which became the published result, was that men's and women's preferences for children were not the same.⁷⁷ Our data were consistent with the husbands "purchasing" time with their children up to "reasonable and liberal visitation" levels.⁷⁸ If he received more time than this, he paid less in absolute terms.⁷⁹ The data did not reveal the point at which the wife's preferences for child-time declined. This indicates that this threshold is reached less than ten percent of the time. Once this threshold is reached, the wife would pay to get less time with the children.⁸⁰

I still wondered, based upon anecdotal evidence, whether risk aversion might be operating during this bargaining process. I therefore ran some experiments of my own⁸¹ and looked at traffic ticket data for two counties

findings was the difference in frequency of litigation of any type: Virginians litigated 21.45% of the time, compared to only 9.27% in Wisconsin.

76. Risk aversion refers to the ratio of the second derivative of the utility function to its first derivative; it has to do with the willingness to settle for less than the expected utility of a gamble in order to avoid the chance of a bad outcome. See generally Milton Friedman & L.R. Savage, *The Utility Analysis of Choices Involving Risk*, 56 J. POL. ECON. 249 (1948). The literature involving divorce bargaining and assuming risk aversion includes Jane W. Ellis, *Surveying the Terrain: A Review Essay of Divorce Reform at the Crossroads*, 44 STAN. L. REV. 471 (1992); Jon Elster, *Solomonic Judgments: Against the Best Interests of the Child*, 54 U. CHI. L. REV. 1 (1987); Melli et al., *supra* note 74, at 1154; Mnookin & Kornhauser, *supra* note 72, at 1025; and Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615 (1992).

77. Brinig & Alexeev, *supra* note 71, at 289-90.

78. *Id.* at 286-87.

79. *Id.* at 287 & n.38. This observation was consistent with an explanation that the fathers visiting their home were more satisfied not only when they had more time with their children, but when the children were of higher "quality." Fathers also visited more or less depending upon their opportunity cost of time: if visitation prevented them from earning substantial sums, they visited less often or for shorter time periods. See Douglas W. Allen, *What Does She See in Him? The Effect of Sharing on the Choice of Spouse*, 30 ECON. INQUIRY 57, 65-66 (1992) (attributing divorce to the decrease in value of the marriage to one partner due to changes in that partner's life, rather than the availability of other possible partners); Gary S. Becker & Gregg Lewis, *On the Interaction Between the Quantity and Quality of Children*, 2 J. POL. ECON. S279, S279 (1985) (the shadow price of children with respect to the cost of an additional child is greater the higher their quality is).

80. Brinig & Alexeev, *supra* note 71, at 288. We suggested that this might be because the wife felt that the father's participation was good for the child, or because she wanted some time for herself. *Id.* at 288 & n.44.

81. These involved over 300 subjects drawn from an elementary school, a high school, and George Mason University metro campus (which houses the law school). Subjects were asked to choose one of three jars from which to draw a ball. Each jar had a different number of winning balls, and different size prizes could be won. The choices varied from a "risk averse" jar, with a 75% chance of winning a small prize to a "risk preferring" jar, with a 10% chance of winning a large prize. Very young children were uniformly risk averse. As males approached puberty, increasingly they chose the risk preferring jar. After about age forty, there was no difference in choices based upon gender.

in Virginia,⁸² behavior on state lotteries, life insurance purchases, and the number of items omitted by men and women taking the SAT.⁸³ In each case,⁸⁴ women did not seem significantly more risk averse than the men in the population. It was not worth publishing such a nonresult, so I waited to test another characteristic that might distinguish male and female risk aversion tendencies. My opportunity came when I read the report of a study involving altruism reported in *Beyond Self-Interest*.⁸⁵ I repeated a version of the experiment using gender as a variable.⁸⁶ I also obtained data on charitable giving broken down by age, income, and gender.⁸⁷ In neither

82. Arlington County broke down its data between radar and nonradar tickets and provided the number of violators in each of these two ticket categories, broken down by age. Fairfax provided individualized data including age, gender, and zip code, from which I could proxy income for each category. Although women are ticketed for speeding in about the same proportion as men for less severe offenses, they are much less likely to receive tickets for speeds greatly in excess of the posted limit, controlling for age and income. The alternative explanation for these results is that women speed as much as men do, but receive less severe tickets from arresting officers.

83. In addition to published studies, I ran regressions on a 10,000 person sample drawn from the November 1991, Scholastic Aptitude Test (SAT). The studies had concluded that "the percentage of females omitting or not reaching any item is consistently greater than the percentage of males omitting or not reaching that same item. Across all three forms, there are no items where males omitted at a greater rate than females." Mary Jo Clark & Jerilee Grandy, *Sex Difference in the Academic Performance of Scholastic Aptitude Test Takers*, COLLEGE BOARD REPORT NO. 84-8, 7 (1984); see also Alicia Schmitt et al., *Differential Speededness and Item Omit Patterns on the SAT*, EDUCATIONAL TESTING SERVICE—REPORT NO. 91-50, 15 (1991) (noting that females on the 1984-85 SAT omitted items more frequently than males, especially on less difficult questions, although there was no evidence that females performed less speedily).

84. I also examined studies of women's employment performance patterns from the following sources: Robert Masters & Robert Meier, *Sex Differences and Risk-Taking Propensity of Entrepreneurs*, J. SMALL BUS. MGMT. 31 (January 1988) (finding no differences between male and female entrepreneurs' willingness to take risks); Martha Terdick, *Women Like Us*, 51 BUS. Q. 60 (Summer 1986); Michael Wallach & Albert Caron, *Attribute Criteriality and Sex-Linked Conservatism as Determinants of Psychological Similarity*, 58 J. ABNORMAL SOC. PSYCH. 43 (1959). Further, I examined their purchase of insurance by gender, income, age, and marital status categories. The data was obtained from LIFE INSURANCE MARKETING AND RESEARCH ASSOCIATION, INC., THE BUYER STUDY: A MARKET STUDY OF NEW INSUREDS AND THE ORDINARY LIFE INSURANCE PURCHASED (1991).

85. Robyn M. Dawes et al., *Cooperation for the Benefit of Us—Not Me, or My Conscience*, in BEYOND SELF INTEREST 97, 101-03 (Jane J. Mansbridge ed., 1991). Other versions of the study are reported in Robyn Dawes et al., *Not Me or Thee But We: The Importance of Group Identity in Eliciting Cooperation in Dilemma Situations: Experimental Manipulations*, 68 ACTA PSYCHOLOGICA 83 (1988).

86. My experiment, modeled on the one in BEYOND SELF-INTEREST, *supra* note 85, included over 600 subjects drawn from various age groups, divided into groups of five. Each subject could choose to keep five candies or to donate them to the group. If a majority of the group gave, each member, including those who did not donate, would get an additional five. The donors would thus get 10, the others 15. If less than a majority contributed, the donors would lose their five candies while the nondonors would keep theirs. My PROBIT regression analysis used age, gender, and income as independent variables. There were significant results for age, but insignificant results for gender.

87. This data is reported in INDEPENDENT SECTOR, GIVING AND VOLUNTEERING IN THE UNITED STATES 54, 69, tbls. 1.18 & 2.1 (1992).

my own experiment nor the published data on giving did I find any perceptible difference in how men and women behaved.⁸⁸

What conclusions was I able to draw from this empirical work? In the marketplace, or in any setting not involving their families, women perform very similarly to men.⁸⁹ When their husbands and children are involved, however, real differences in decision-making appear.⁹⁰ The conclusion of the bargaining piece—that preferences, not differential risk aversion, determined the results—still seems correct.⁹¹

88. The tables show that women heads of household give a total of 1.6% of their income to charities, while men heads of households give 1.8%. The size of gifts given at every income level is higher for men than women. See *Why Can't a Woman Give Like a Man?* WORKING WOMAN, Nov. 1992, at 70 (studying giving habits of men and women). Single and divorced women participating in the survey volunteered insignificantly more of their time to charitable causes than did their male counterparts. *Id.* In this study, there was no control for income (opportunity cost).

89. See Joan W. Scott, *Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism*, 14 FEMINIST STUD. 33, 46 (1988) (rejecting the use of "difference" or "equality" to define women while trying to create a structure that allowed women to be both different and equal; this structure would account for certain behavior in the family and certain behavior in the workplace such as a willingness to be tough but fair-minded in business dealings while remaining loving, giving, and nurturing in interactions with children).

90. Despite increasing work force participation, there has been no real change in the overall time mothers spend with their children. W. Keith Bryant, *Are We Investing Less in the Next Generation? Historical Trends in Time Spent Caring for Children 16-17* (1992) (presented at Social Science Proceedings, American Statistical Association, Fort Lauderdale, Florida, 1993). Work seems to have more impact in those aspects of family life in which children tend to be "peripheral," such as homemaking or entertaining, compared to activities that are specifically "child-oriented." Steven L. Nock & Paul William Kingston, *Time with Children: The Impact of Couples' Work-Time Commitments*, 67 SOCIAL FORCES 59, 71 (1988). However, despite gender equality and involvement with the work force, it is still primarily women who raise children. One study showed a disparity of at least 2 to 1 between women's and men's participation in all aspects of child care. Cynthia Rexroot & Constance Sheehan, *Family Life Cycle and Spouse's Time in Housework*, 49 J. MARRIAGE & FAM. 737, 744 & tbl. 3 (1987). The division of labor is equally dramatic for household tasks. See FUCHS, *supra* note 17, at 103 (comparing the division of household labor in the United States, the Soviet Union, and Sweden, and finding that in all three countries, women still perform the overwhelming majority of domestic work); Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 19, 85 & n.14 (1989) (arguing that inclusion of women in the workforce has not increased the time men spend in the home); Rebecca Stafford et al., *The Division of Labor Among Cohabiting and Married Couples*, 39 J. MARRIAGE & FAM. 43, 53 (1977) (explaining the persistent division of domestic labor as a function of ideology and learned behavior rather than the outcome of a power struggle or different amounts of available time); JoAnn Vanek, *Time Spent in Housework*, SCI. AM., Nov. 1974, at 116, 118 (noting that employed women spend less time on housework but that husbands of employed women do not do more housework). It is, of course, possible that what looks like altruism here is another example of the "draftee" being expected to do necessary work. See Czapan-skiy, *supra* note 16 (discussing inequalities in family law that allow men to not care for children but punish women for the same behavior).

91. Jana Singer, in a recent telephone conversation, suggested that this distinction may also explain some of the differences between the literature written by women studying gender differences in the family alone, see, e.g., MARTHA FINEMAN, *ILLUSIONS OF EQUALITY* (1991); MARY A. GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 94-102 (1987);

These discoveries leave a host of unanswered questions. One is whether these differences are learned⁹² or innate.⁹³ Another is whether gender differences will disappear as our children⁹⁴ become spouses and parents.

Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988); Mary A. Glendon, *Family Law Reform in the 1980s*, 44 LA. L. REV. 1553 (1984); and women writing about other women outside the family who give an entirely different perspective; see, e.g., CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED* 52-53 (1987) (arguing that the mother-child relationship is an outgrowth of male dominance); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 799-800 (1989) (rejecting Carol Gilligan's description of "women's voice" when used to marginalize women in the marketplace). Telephone discussion with Jana Singer, Professor of Law, University of Maryland (Feb. 10, 1994).

92. One proponent of this view is CHODOROW, *supra* note 16, at 7.

93. Writers who believe the differences are biologically based include: Richard Epstein, *The Varieties of Self-Interest*, 8 PHIL. & POL. 102 (1990); Alice S. Rossi, *A Biosocial Perspective on Parenting*, 106 DAEDALUS 1 (Spring 1977), Alice S. Rossi, *Equality Between the Sexes: An Immodest Proposal*, 93 DAEDALUS 607 (Spring 1964). The theory adopted will determine, to a great extent, the direction the law takes. The sociobiologists' argument is that gendered behavior is innate like sexual preference, so that legal changes can only harm people exercising innate tendencies. Compare Richard A. Posner, *The Radical Feminist Critique of Sex and Reason*, 25 CONN. L. REV. 515, 517 (1993) (explaining RICHARD A. POSNER, *SEX AND REASON* (1992) as an exploration of relation between biology and sexuality); and the criticism of his position in Robin L. West, *Sex, Reason and a Taste for the Absurd*, 81 GEO. L.J. 2413, 2419 (1993) (relating and criticizing Posner's theory that individuals have innate preferences for sexual partners of a certain sex, but will substitute a nonideal partner if the search costs are too high) with CATHERINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 218 (1989) (arguing that all gender differences are socially constructed); Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 836-37 (1990) (describing the distinct feminist ways to practice law that spring from women's experiences in society, not biology); Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118, 1126-28 (1986) (arguing that the legal regime has enforced social stereotypes that force women to be seen as different); Marsha Garrison, *Marriage: The Status of Contract*, 131 U. PA. L. REV. 1039, 1060 (1983) (reviewing LENORE J. WEITZMAN, *THE MARRIAGE CONTRACT* (1981) and discussing the use of negotiations for divorce settlements as a change in the law the controls behavior); Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291, 309 (1987) (defending California's no-fault divorce statute because it led the way for other laws in areas of child support and family leave, which increased gender equality); Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath*, 56 U. CIN. L. REV. 1, 80 (1987) (proposing a legal regime that includes incentives for women to make economically abling decisions); Herma Hill Kay, *Models of Equality*, 1985 U. ILL. L. REV. 39, 84 (arguing that principles behind Pregnancy Discrimination Act should be applied to women generally to take account of women's unique circumstances); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984) (proposing new constitutional doctrine that would recognize a woman's unique biological functions); Martha Minow, *The Supreme Court, 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 34-57 (1987) (tracing the different treatment of certain groups to the inability of the powerful to question the status quo); Carol Weisbrod, *Practical Polyphony: Theories of the State and Feminist Jurisprudence*, 24 GA. L. REV. 985, 1001 (1990) (suggesting that feminist legal theory would change the legal regime to one that valued pluralism and groups); West, *supra* note 13, at 28-30 (discussing the differences between cultural feminists who attribute gender differences to biology and radical feminists who see the differences as socially constructed).

94. They presumably will not have the same problems because they are being raised in an age where gender equality is treated as a given.

We might expect this to be the case if the gender discrepancies of today's world were produced by a society that pressured the current generation of parents to behave in gendered patterns. I also cannot say whether the changes in family law that have produced so many other shifts in society will also change these values.⁹⁵ Finally, I do not pretend to divine whether the current differences in attitudes about family are good or bad. They just are, and in legal planning I think we will have to reckon with them.

95. No-fault divorce apparently produces fewer marriages, fewer children, and less investment in marriage. Brinig & Crafton, *supra* note 23. It has also produced a dramatically higher divorce rate, and therefore many more children growing up without two parents at home. See, e.g., Carbone & Brinig, *supra* note 28, at 975-79 & nn. 96-121.

